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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1207

JAMAICA WATER SUPPLY COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 30–43) is reported in 42 B. T. A. 359. The opinion of the Circuit Court of Appeals (R. 142–145) is reported in 125 F. (2d) 512.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 18, 1942 (R. 146). The petition for a writ of certiorari was filed on May 2, 1942. Jurisdiction of this Court is invoked

under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner water company supplied a municipality with hydrant service, claiming as reasonable compensation a rate in excess of that contended for and paid by the city. Suit by petitioner to recover the difference terminated in a consent judgment during a later year. The judgment was paid in a still later tax year. The question is whether petitioner, at all times on the accrual basis, should account for the amount of the judgment as income in the years during which it was earned, in the year when the judgment was entered, or in the year when the judgment was paid.

STATUTE AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations are set forth in the Appendix, infra, pp. 11–15.

STATEMENT

The facts may be summarized as follows from the findings of the Board of Tax Appeals (R. 32–35) and the stipulation of the parties before the Board (R. 53–138):

Petitioner water company is a New York corporation engaged in supplying water for domestic and public purposes, including the furnishing of fire protection, in Queens County, New York (R. 32). Until July 1, 1913, petitioner supplied hy-

drant service to the City of New York in the Borough of Queens under a contract which provided for a rental of $18 per hydrant per annum. The contract terminated on July 1, 1913. Thereafter petitioner continued to supply service at the same rate. On April 29, 1919, petitioner advised the City that from January 1, 1919, it would charge a rental of $45 per hydrant per annum. Beginning June 30, 1919, petitioner regularly billed the City at the $45 rate. The City, however, continued to pay only $18. The water company accepted these payments under protest, later filing claims with the City for the difference. (R. 32.)

On October 22, 1929, petitioner brought an action against the City to recover, with interest, $822,330.42, which was calculated to be the difference between the amount paid by the City to petitioner at the $18 rate and the amount for which petitioner had billed the City at the $45 rate for service rendered during the years 1919 to 1928, inclusive (Ex. Y, R. 120–123). The City contested the action on the grounds that the $45 rate was not fair and reasonable, that petitioner had received the payments made at the $18 rate in full accord and satisfaction of its claims, and that these claims were in part barred by the statute of limitations (Ex. Z, R. 124–126).

On December 21, 1933, the City made an offer to allow judgment to be taken against it in the sum of

$638,185.58, representing principal of $527,355[1] and interest of $110,830.58. The offer was accepted, and a consent judgment was entered on December 22, 1933. By an agreement made shortly thereafter the interest was reduced to $47,645. On July 25, 1934, payment was made in satisfaction of the judgment in the sum of $575,000, being $527,355 principal plus interest of $47,645. (R. 33.)

The hydrant rental account was shown on petitioner's books in two columns, one recording the charge of $18 per hydrant and the other a charge of $45. Its journal entries were made on the basis of the $18 rate. (R. 32.) Before and after 1933 petitioner consistently maintained its books on the accrual basis, and prepared and filed its federal income-tax returns accordingly. In its income-tax returns for the tax years[2] 1923 to 1928, inclusive, petitioner included income at the $18 rate per hydrant and not at the $45 rate. (R. 33–34.) The entire cost of furnishing hydrant service for each of the years 1923 to 1928, inclusive, was charged by petitioner on its books to the years in which that service was rendered. The cost was claimed as a deduction on petitioner's income-tax returns filed for those years and was allowed. (R. 33.)

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[1] This amount was based on payment at the increased rate during the years 1923 to 1928, inclusive, in respect of which petitioner's claims were not barred by the statute of limitations.

[2] Petitioner kept its accounts on the basis of a fiscal year ending June 30 (Pet. 2–3).

The Commissioner included in petitioner's gross income for the fiscal year ended June 30, 1934, the $575,000 received from the City in satisfaction of the judgment (R. 34). The Board of Tax Appeals sustained the action of the Commissioner (R. 30). The Circuit Court of Appeals affirmed (R. 146).

ARGUMENT

1. During the tax years involved in the present case section 472 of the Greater New York Charter required petitioner to supply hydrant service in Queens under the superintendence of a city commissioner at rates which were just and reasonable; in case of controversy over what rate was just and reasonable the issue was to be determined judicially. See R. 144; Pet. 2. Petitioner between 1913 and 1919 furnished service to the City at $18 per hydrant per annum, in accordance with the rate set in the earlier expired contract. Subsequently, the City paid for continued service at the $18 rate, contending that it was liable for no additional charge. Until the close of petitioner's suit against the city, it was not determined that the City was under *any* liability to petitioner. Accordingly, the sum received in payment of the consent judgment did not accrue as income during the years 1923–1928, but in December 1933, when both the existence and amount of the City's liability were ascertained. *United States* v. *Safety Car Heating Co.*, 297 U. S. 88; *Lucas* v. *North*

Texas Co., 281 U. S. 11; *Patrick McGuirl, Inc.*, v. *Commissioner*, 74 F. (2d) 729 (C. C. A. 2), certiorari denied, 295 U. S. 748; cf. *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115; *Lucas* v. *American Code Co.*, 280 U. S. 445.

2. Petitioner asserts that the decision of the court below conflicts with the decisions of this Court and of other circuit courts of appeals in *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290; *New York Central R. R.* v. *Commissioner*, 79 F. (2d) 247 (C. C. A. 2), certiorari denied, 296 U. S. 653; *Helvering* v. *Gulf, M. & N. R. R.*, 71 F. (2d) 953 (App. D. C.); *Helvering* v. *St. Louis Southwestern Ry.*, 66 F. (2d) 633 (C. C. A. 8), certiorari denied, 292 U. S. 626; *Commissioner* v. *Midland Valley R. R.* 57 F. (2d) 1042 (C. C. A. 10); and *Commissioner* v. *Old Dominion S. S. Co.*, 47 F. (2d) 148 (C. C. A. 2).

The *Continental Tie & Lumber Co.* case concerned a short-line railroad which competed with railroads under federal control prior to March 1, 1920. Section 204 of the Transportation Act, 1920, provided for award and payment to such a railroad to compensate for deficits in operating income incurred during the part of the period of federal control when the private company operated its own road. The Court held that income arising from an award made by the Interstate Commerce Commission and paid by the Treasury in 1923 accrued, nevertheless, in 1920, because the right to receive the income became established on

enactment of the Transportation Act; only administrative computation of the amount remained to be done, and that amount was already approximately ascertainable from data in the company's books.

In the *New York Central* case the railroad received in 1920 and 1921 additional compensation for mail carriage in 1916 and 1917; the court merely held that these sums were not income in 1920, but had accrued at least as early as 1919, when the Interstate Commerce Commission had rendered a decision settling the basis for additional railway mail pay.[3]

The other cases cited by petitioner as conflicting concerned railroads entitled to receive just compensation from the United States for use of their lines during federal control; in each an amount above the "standard return" (contemplated by the Federal Control Act to be applicable in the majority of cases) was paid to the taxpayer railroad after the period of federal control. In these cases liability for compensation was apparent as early as the years to which earning of the compensation was attributable; only the amount of the compensation remained to be determined. The courts held that the sums determined to be due and paid in years after 1920 accrued as income during

[3] An entirely similar issue in the *Gulf* case was disposed of in the same way by the Court of Appeals on a limited reconsideration. 71 F. (2d) at 956.

the years in which they were earned. These decisions are entirely consonant in result with the decisions of this Court referred to at pages 5 and 6, *supra*.

Petitioner states, however, that in each case the taxpayer had received the "uncontested amount of its compensation in the year in which the service was rendered" (Pet. 4–5, 9),[4] implying that the Government then disputed the taxpayer's right to receive any further compensation; a conflict is therefore said to exist with the decision below. However, it will be noted that, under section 2 of the Federal Control Act, until a carrier made an agreement with the Government on compensation the President was authorized to pay it not exceeding 90 percent of the "standard return", pending a determination of the total just compensation. Section 2 of the Act of March 21, 1918, c. 25, 40 Stat. 451. In each of the federal control cases cited by petitioner agreement was not reached until final settlement, and the intermediate dispute, then, concerned the *amount* of additional compensation due, the Government acknowledging some further liability. See 71 F. (2d) at 954; 66 F.

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[4] In the *Old Dominion* case none of the compensation was paid during the years when it was earned. See 47 F. (2d) at 149. The opinions in the *Gulf* and *St. Louis Southwestern* cases do not disclose that any amounts were paid by the Government to the railroads before 1920. See 71 F. (2d) at 954; 66 F. (2d) at 633.

(2d) at 633; 57 F. (2d) at 1043; 47 F. (2d) at 149. Accordingly, these circuit court of appeals cases present no conflict with the decision below, where the City of New York denied that it was under any liability to petitioner after it paid current bills at the $18 rate between 1919 and 1928.

3. Petitioner's alternative argument, that the amount of the consent judgment was income for its tax year 1935 rather than for its tax year 1934, is without merit since petitioner kept its books on the accrual basis. All of the factors definitely fixing liability of the City to pay were determined in December 1933, within the fiscal year ending June 30, 1934; the right to receive was established by the consent judgment and the amount receivable was then accrued. The time of actual receipt is therefore immaterial. *Spring City Foundry Co.* v. *Commissioner,* 292 U. S. 182. Petitioner's reliance (Pet. 10) on Article 331 of Regulations 77 for a different result is mistaken. The article does not differentiate between the year in which judgment is given and the year in which the judgment is paid, but merely states that money recovered in litigation does not result in the accrual of income for an earlier year during which the claim in suit arose.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. It follows the applicable principles an-

nounced by this Court and presents no conflicts. It is therefore respectfully submitted that the petition should be denied.

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